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Reproductive Medicine and Violation of the "Free Exercise" Clause of the United States Constitution

by

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Over the years of my involvement in obstetrics and gynecology, and reproductive medicine and surgery I have had the opportunity to see, first hand, how the religious liberties of individual physicians, medical students, nurses, patients, etc., have been violated by the contemporary trends in reproductive medicine. Since the advent of oral contraceptives, the practice of obstetrics and gynecology as it relates to procreative medicine has dramatically changed. Contraception, sterilization, abortion and in vitro fertilization are the foundation upon which reproductive medicine decision making is made. These decisions are often made with a "steam roller effect" which is completely devoid of any consent from those who are impacted by the implementation of those decisions.

It has been an interesting series of events to watch over these years as the profession has become less and less diagnostically attuned and more and more "band aid" oriented. The birth control pill is used for the treatment of almost every gynecologic malady known, even though it cures none of them. Family physicians, internists, pediatricians and others tend to follow the same approach as their OB-GYN colleagues. With in vitro fertilization, instead of finding out what the underlying cause of one's infertility or reproductive problem might be, there is a "jumping over" of the underlying causes (the diseases) and a pursuit directly to a solution which first of all is very expensive, second, is not very effective and third, is considered to be highly immoral and unethical by many people in our society.

The same could be said for the simplistic solution of abortion for all of the socioeconomic ills that seem to confront pregnant women. With the artificial reproductive technologies, the physicians involved seem to ignore the possibility that their patients might abhor even the very thought of being involved in abortion related events.

At the foundation of all this is a significant violation of the individual's liberty to pursue their own religious beliefs. This is particularly true for those who are Catholic because the Catholic Church, unlike many other religions, has a long-standing and well developed — and I might point out, quite contemporary — approach to all of these issues. Thus, the informed Catholic will understand what the Church is saying, why it is saying it, and not view it as being punitive or rigid but rather, see it as liberating to them. Their religious beliefs lead them to a kind of liberty that goes beyond simply the “witchcraft” or “superstition” notion of religion that is such a common view in American society today.

It is the purpose of this article to point out that much of this would appear to be in violation of the “free exercise” clause of the United States Constitution and **to challenge those who could be effective** in the arena of constitutional law to become involved in the challenge of certain practices based on the violation of the free exercise clause of the United States Constitution.

To remind everyone reading this article, the “Free Exercise” Clause is found in the First Amendment to the United States Constitution. This is the first of ten amendments which were ratified December 15, 1791, and form what is known as the “Bill of Rights.” This amendment reads:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.¹

I would like to illustrate the type of concerns that are raised in the practice of reproductive medicine with three real-life examples that I have been involved with recently. In each of these cases, an individual's First Amendment “free exercise” rights were grossly violated. I should point out that this represents three examples to which there could be many, many additional examples added and to which I have personal experience with or exposure to.

Example 1

An OB-GYN first year resident is admitted through the matching program to a residency in obstetrics and gynecology. During the process, he files a formal application and is interviewed by the OB-GYN faculty and staff as a prospective resident. This individual has graduated high in his medical school class and has additional very high academic credentials. After being accepted into the program and beginning his residency, the chairman of the department, the various faculty members and fellow residents place an enormous amount of pressure on the individual because of their having to "pick up the slack" for what they view as an individual who is not "carrying his load."

Of course, the individual is more than willing to "carry his load", he just does not wish to, by nature of his moral and conscience formation, participate in contraception, sterilization or abortion practices. This same individual would be more than happy to participate in a program which is designed to provide within its training department making it (one would think) even more desirable to have this individual resident on their staff so that those services can be provided to those patients who would wish those services and who, in some ways, will be sharing the individual resident's moral and ethical concerns.

Nonetheless, all of this is ignored and the pressure becomes so intense that the individual resident gives up his long-standing desire to become an obstetrician-gynecologist and changes direction and goes into a family practice residency.

The above story could be multiplied manyfold if one were to include medical students and nursing students and others who are forced in one way or another to participate in contraception, sterilization or abortion. They are **highly ridiculed and discriminated against** because of their views on these issues. These views are **deeply held moral beliefs** which come out of a long-standing intellectual and spiritual Catholic tradition which is, for the most part, completely misunderstood and extraordinarily warped in the views of those individuals in decision making positions. The prejudice, discrimination and intolerance is clear and obvious.

Now what really makes this of great significance is that this is a **state run** institution which is protected by both state and federal law and, in fact, is supported by both state and federal tax dollars. So when the first amendment to the United States Constitution says: "Congress shall make no law ...prohibiting the free exercise thereof;" this residency program, while prohibiting the free exercise of this individual's religious beliefs (not to be viewed as the same as an individual who refuses to provide good medical care) and supported by various laws and taxes, is

in *de facto* violation of the first amendment to the United States Constitution and these practices should be viewed as unconstitutional.

Example 2

The second example involves a woman who has had a variety of different reproductive and infertility problems. She has had two pregnancies that have ended in **classical** Caesarean Section making her risk of subsequent rupture of the uterus increase particularly if she has multiple pregnancies.

She seeks medical care from a reproductive endocrinologist at a **state run** medical school and in the process of her care the reproductive endocrinologist hyperstimulates the woman's ovaries so that 10 to 15 follicles in one or the other ovaries are produced in any given menstrual cycle. This is common practice by reproductive endocrinologists because it elevates their pregnancy rates. Of course, at the same time, it **definitely** elevates the multiple pregnancy risk. Unbeknownst to the patient, who is a Catholic, the reproductive endocrinologist is not concerned about the multiple pregnancies because if that occurs she will simply recommend to the patient "selective reduction" (which is a practice of killing a number of the babies leaving a "reduced" number of babies present). And, it should be pointed out that the reproductive endocrinologist did not discuss any of this in advance with this patient nor did the reproductive endocrinologist discuss with the patient her and her husband's religious beliefs.

As a direct outcome of this treatment protocol the woman became pregnant with **quintuplets**. The reproductive endocrinologist was rightfully concerned about this event because of the patient's previous classical Caesarian Sections and immediately told the patient not to worry because she can have selective reduction. However, the patient was very much against this approach to managing her pregnancy. She was, nevertheless, referred to a perinatologist **still at the state university** who said to her that "You will die" if you do not have the selective reduction and his proposition was to kill four of the babies, leaving one remaining.

Three days prior to her appointment for the selective reduction we saw her here at the Pope Paul VI Institute. In a short period of time we were able to arrange for her to receive care at another institution that specialized in high order multiple pregnancies. By the time we had seen the patient one of the babies had spontaneously died leaving a quadruplet pregnancy. She subsequently delivered, quite prematurely, but three of the four remaining babies did survive. The one that was stillborn, incidentally, was the only one that would **not** have been "reduced", leaving one to think that she would have had no successful outcome if

she had undergone the reduction. At the time of her Caesarian Section her uterus was completely intact.

The important issue that this example illustrates is the role again of the **state run** institution and the **state employee** (the reproductive endocrinologist and the perinatologist in the case) both of whom are supported and protected by state and federal law and funding. Again, such an approach to patient care would appear to be in *de facto* or significant violation of this patient's first amendment "free exercise" rights: "Congress shall make no law ...prohibiting the free exercise thereof" (of religion).

The important illustration in this case is that a patient has gone to a physician who is propped up by both state and federal law and state and federal dollars and the physician is grossly violating that individual's free exercise of their religious beliefs. In my experience, it would be true to say that this individual physician or ones like her would **laugh and ridicule** this individual's religious beliefs.

Example 3

The third example is an individual who is covered by medical insurance which will reimburse coverage for contraceptive medications or devices, abortion and/or diagnostic testing that leads to an abortion such as triple screening, amniocentesis with genetic screening, etc. At the same time, these same insurance companies will not reimburse for natural family planning services for either avoiding pregnancy or health monitoring.

Another example that could be placed within this general category would be the exclusion of insurance coverage for what is referred to as "fertility related testing" which often excludes the evaluation of the underlying diseases and conditions which lead to reproductive problems and anomalies. In fact, as a specialist in reproductive medicine and surgery I can guarantee the reader that almost all reproductive problems including infertility, miscarriage, etc. are due to some type of organic, hormonal or immunologic cause which not only causes the reproductive anomaly but also puts the woman at some other medical risk in terms of her long term health. The denial of insurance coverage in these areas is medically inconsistent but also forces or coerces the individual not to receive medical treatment and/or go in directions, especially when it comes to abortion, contraception, sterilization, artificial reproductive technology, etc. which violate their own religious beliefs.

The medical insurance business is significantly propped up by both state and federal law and there are so many protections they have been

given that in the usual sense they are protected from a variety of different lawsuits and other avenues of redress.

The insurance companies — and this would also include the government run insurance programs such as Medicaid and Medicare — are violating, day in and day out, the individual's liberty to freely exercise their religion in a way which is consistent with their own beliefs. Since the companies are propped up by both state and federal law, they are, *de facto*, in violation of the first amendment to the United States Constitution which I would once more like to remind you reads: "Congress shall make no law ...prohibiting the free exercise thereof" (religion).

One other very contemporary problem which should not be left unmentioned is represented by the managed care programs which exclude physicians because they practice medicine in accord with their religious beliefs (again, not to be confused with poor medical practice). In this case, keeping the physician out of the managed care program because of his/her religious beliefs violates the first amendment in two ways: first, it violates the physician's right to practice medicine in accord with his or her religious beliefs but it also violates the religious beliefs and "free exercise" of religion of an untold number of patients who are excluded from seeing that physician (who practices in accord with their religious beliefs).

The above are examples that I have had many experiences with over the years of my practice. There are many other examples that could be identified here.

The publicity that has been given to the violation of the first amendment of the United States Constitution is usually related to as the "establishment clause" or the protection of "freedom of speech" or "freedom of the press." We are also quite aware of the right guaranteed in our constitution for people to peaceably assemble or even to petition the government for redress of grievances. However, the portion of the first amendment which indicates that "Congress shall make no law ...prohibiting the free exercise thereof" (religion) is one that has received virtually no publicity and little action over the many years of its existence. This may be the result of a certain kind of passivity that exists amongst those individual patients, physicians, medical and nursing students, lawyers, and all others participating in this to confront the legal authorities with these issues.

In fact, it is my belief that **this must occur and it must occur soon.** Catholic universities and medical schools, Catholic hospitals, Catholic physicians and nurses, medical and nursing students, individual patients who are Catholic, and any others who share these types of religious beliefs need to realize deep in their hearts that they are not able to truly

exercise their religious beliefs unless there is a certain component of social support for it. This comes as the result of one's religion being totally respected.

To be able to freely exercise one's religious beliefs in a medical setting should require at least all of the following (the **RICHA** Freedoms):

- Freedom from **R**idicule
 - Freedom from **I**ntimidation
 - Freedom from **C**oercion
 - Freedom from **H**arassment
- and
- Freedom from Medical **A**bandonment

In each of the cases I have cited in this paper, the individual's religious liberty has been significantly abridged and violated. For a religious believer, the violation of these freedoms violates the "free exercise" clause. One of the great tragedies of this problem is the ultimate **abandonment** of the patient or student or physician, etc. that this produces. In fact, such medical abandonment, placed in any other context, is in significant opposition to the basic standards of medical ethics.

One of the ironies of this discussion which should not go unmentioned is the role of Catholic institutions themselves in the denial of the "free exercise" clause. While the examples I have cited involve state run institutions, direct or indirect complicity with very similar violations has been observed in Catholic institutions as well.

It has been my sense over the years of my observation that being a Catholic in the United States is, for the most part, not very well respected. While that may be true, it is not true to say that what the Catholic Church has to say in these areas is either irrelevant or ridiculous or unintelligent or anti-intellectual or unenlightened or any of those characterizations that seems to ridicule it. In fact, it just could be that the Church is at the forefront of thinking in many of these areas allowing its believers to a life that can produce a great deal of joy, love, happiness, and peace.

As a result of this, it is important for every Catholic and any other religious person who is of similar belief to become committed and convicted to their beliefs to the extent of being willing to challenge these program policies as an abridgment of the "free exercise" clause of the first amendment to the United States Constitution. In addition, it is vitally important that individual lawyers and legal associations, special interest law firms, constitutional attorneys, civil rights attorneys, etc. become involved in the challenge of these practices at the very core level of our constitution. I personally believe that the **next great revolution in**

American civil rights will come about as a result of the proper implementation of the "free exercise" clause of the Unites States Constitution.

As a final point in all of this, I would like to point out that our founding fathers placed in a special order the "free exercise" clause, placing it ahead of the following: "...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government..." We have over many years been somewhat concerned as a society about fully implementing the "free exercise" clause because it seems to always come into conflict with the "establishment" clause. However, it is in all of our vital interests as a sane and rational, compassionate and sensitive society to see to it that the "free exercise" clause and the "establishment" clause be enforced in ways so that **both** are protected and **neither are denied**.

References

1. The Constitution of the United States of America. Applewood Books, Bedford, MA, p. 18.